STATE OF MICHIGAN

COURT OF APPEALS

DONNA HILL,

Plaintiff-Appellant,

v

CITY OF EASTPOINTE,

Defendant-Appellee.

UNPUBLISHED
March 16, 1999

No. 204064
Macomb Circuit Court
LC No. 96-003620 NO

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

PER CURIAM.

In this "highway exception" case, plaintiff Donna Hill appeals as of right the trial court's order granting summary disposition in favor of defendant. We reverse and remand.

On April 5, 1994, plaintiff was walking across the street in front of her home, located in the City of Eastpointe, when she tripped and fell on a portion of the street pavement that was allegedly upraised by between three-fourths of one inch and one inch. As a result, she broke her left wrist. Plaintiff alleged that the condition of the roadway was attributable to defendant's failure to keep it in reasonably safe repair for travel in accordance with the "highway exception" to governmental immunity, MCL 691.1402; MSA 3.996(102). After discovery, defendant filed a motion for summary disposition, which the court granted, relying upon this Court's opinion in *Suttles v Dep't of Transportation*[1] and noting that pedestrian accidents generally fall outside the scope of the "highway exception."

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It is well settled law in Michigan that governmental agencies are immune from tort liability while engaging in a governmental function, unless an exception applies. MCL 691.1407; MSA 3.996(107); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984). The "highway exception" to governmental immunity, codified by statute at MCL 691.1407; MSA 3.996(107), provides that governmental immunity may not apply where an agency does not "keep a highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel."

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In the case at hand, the trial court granted summary disposition for defendant on the basis that a pedestrian who was not involved in a vehicular accident could not qualify to recover damages under the "highway exception," relying in part on this Court's decision in *Suttles*, which in turn relied upon *Mason v Wayne County Board of Road Commissioners*, 447 Mich 130; 523 NW2d 791 (1994). Since this time, the Supreme Court reversed and remanded this Court's opinion in *Suttles v Dep't of Transportation,* 457 Mich 635, 645; 578 NW2d 295 (1998). In that case, the Supreme Court clearly held that pedestrians are covered by the "highway exception" to governmental immunity, MCL 691.1402; MSA 3.996(102), at least in certain situations.[2] *Id.* at 645, 652. In the instant case, it is undisputed that the claim arises from an alleged maintenance defect in the street itself and that plaintiff was located in the street at the time that she fell and injured herself. Thus, as a result of the Supreme Court's holding in *Suttles,* it is clear that defendant here, as the governmental agency with jurisdiction over the highway in question, owed some duty to plaintiff, as a pedestrian, to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402; MSA 3.996(102). Plaintiff thus did state a cause of action in avoidance of governmental immunity. See *Suttles, supra* at 651 n 10. Consequently, we reverse and remand to the trial court to apply the "highway exception" to governmental immunity in this case and allow plaintiff to attempt to further prove a cause of action under traditional negligence principles. See *Suttles, supra* at 651 n 10.

We acknowledge that not all of the issues in the instant case were clearly resolved by the Supreme Court in *Suttles, supra*. It is unclear, for example, from the holding in *Suttles* whether governmental agencies must repair only highway defects that pose a threat to vehicular travel or whether they must keep roads in reasonable repair for pedestrians, as with sidewalks.[3] Upon remand, the trial court will need to address this issue as plaintiff attempts to prove a cause of action under traditional negligence principles. See *Suttles, supra* at 651 n 10.[4]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Kathleen Jansen

[1] *Suttles v Dep't of Transportation,* 216 Mich App 166; 548 NW2d 671 (1996), reversed 457 Mich 635 (1998).

[2] Since the defendant in *Suttles* was the state, the "highway exception" to governmental immunity, and thus the state's duty, was limited to the improved portion of the highway designed for vehicular travel, and did not include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. See *Mason, supra* at 135-36.

[3] The Supreme Court has subsequently granted rehearing in the companion case to *Suttles*, *Brown v Dep't of Transportation*, 459 Mich 1227; __ NW2d __ (1998), to address the following question: "[i]n order for a defect to be within the highway exception to governmental immunity, must the defect pose a hazard to vehicular travel."

[4] Judge Markman observes that, in imposing the instant duty upon government agencies under the highway exception, enormous costs will be imposed upon state and local governments without concomitantly improving safety for the principal intended users of such roads, namely vehicular traffic and, in his judgment, without clearly being required by law. See generally *Suttles*, 216 Mich App 166; 548 NW2d 671. He further observes that plaintiff here had an alternative to walking in the street, since there were sidewalks on each side of the street in question. See MCL 257.655; MSA 9.2355. Nevertheless, in light of the Supreme Court decision in *Suttles*, he concurs that reversal and remand is required in the instant case.